

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 29, 2009

TIMOTHY JOSEPH SIMPSON v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Bradley County

No. 07-357 Carroll Ross, Judge

No. E2008-02288-CCA-R3-PC - Filed January 28, 2010

A Bradley County Jury convicted Petitioner, Timothy Simpson, of aggravated sexual battery, a Class B felony, and he was sentenced to nine years. This court affirmed the conviction on direct appeal. Subsequently, Petitioner filed a petition for post-conviction relief, asserting that he was denied a fair trial because he was not given access to prior statements made by the victim and that his trial counsel was ineffective. After a hearing, the post-conviction court denied the petition, and the Petitioner appealed. Upon review of the record and the parties' briefs, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Joseph V. Hoffer, Cleveland, Tennessee, for the appellant, Timothy Simpson.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; R. Steven Bebb, District Attorney General; and William A. Reedy, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

Petitioner was indicted for rape of a child, and in March 2005 a jury convicted him of the lesser-included offense of aggravated sexual battery. Our prior decision disposing of Petitioner's direct appeal describes the circumstances that led to his prosecution:

The evidence from trial reflects that [Petitioner] and his family were good friends with the victim's family and the victim often spent time at [Petitioner's] house. [Petitioner's] wife babysat the victim during the summer while the victim's parents were at work. On July 16, 2004, the victim was at [Petitioner's] house watching a movie with her brother and [Petitioner's] two step-daughters. The children were watching a movie in the girls' bedroom; the victim was sitting on the bottom bunk of the bunk-bed.

[Petitioner] entered the room and laid down on the bed behind the victim. [Petitioner] put his hand down the victim's shorts and into her underwear. The victim said that [Petitioner] "put his hand in her private." The victim told one of the step-daughters what had happened, then went home and told her mother who took her to the doctor after consulting with a pastor. The victim was eleven years old at the time of the incident. Two staff members of [Petitioner's] church, [Petitioner's] father-in-law, and Detective Kevin Felton with the Cleveland Police Department all testified at trial regarding admissions made by [Petitioner] that he had touched the victim's vaginal area or "fingered" the victim. Detective Felton noted that [Petitioner] was bewildered when he was not arrested after making these admissions during the interview.

[Petitioner] asserted that the touching was an accident—that he had fallen asleep and woke up with his hand on the victim's inner thigh. [Petitioner] also asserted that the admissions he made to Detective Felton and the church staff members were admissions of an affair he had with the victim's mother. [Petitioner's] wife also testified that she was under the impression that [Petitioner's] admissions to the church staff members were in regard to his affair with the victim's mother. [Petitioner's] two step-daughters testified that when [Petitioner] laid down on the bed behind the victim, the victim grabbed [Petitioner's] hand, put it around her stomach, and snuggled up next to [Petitioner].

State v. Simpson, No. E2005-02364-CCA-R3CD, 2007 WL 135609, at *1 (Tenn. Crim. App. at Knoxville, Jan. 19, 2007) (brackets omitted).

On direct appeal, Petitioner argued that the trial court erred by, among other things, failing to compel the state to turn over a videotape of an interview with the victim conducted by the Children's Advocacy Center and by failing to give an instruction on assault as a lesser-included offense. Id. at *2. This court affirmed the conviction, concluding that neither issue was properly preserved and that, regardless, neither merited reversal. Specifically, we held that Petitioner had no right to inspect the videotape, id. at *3-4, and that the trial court's

failure to instruct the jury on the lesser-included offenses was harmless given “the wealth of evidence of the defendant’s guilt,” id. at *5-7. We summarized that evidence as follows:

At trial, the victim testified that [Petitioner] put his hand in her underwear and “put his hand in her private.” [Petitioner’s] father-in-law testified that [Petitioner] confessed to him that he put his hand in the victim’s vaginal area. The youth pastor of [Petitioner’s] church testified that [Petitioner] told him, “I fingered her. . . . She crawled up into my lap and I put my hand down her shorts and I fingered her.” The office manager of [Petitioner’s] church testified that she was called to the youth pastor’s office during his conversation with [Petitioner], and [Petitioner] told her that he had already confessed to the detective and “he was so sorry, it was an accident and he needed help and needed forgiveness.” Detective Felton interviewed [Petitioner] during which [Petitioner] admitted that he had stuck his finger into the victim’s vaginal area and admitted that one of his fingers went into her vagina. Detective Felton stated that [Petitioner] said “what the girl says I did I did. . . . I stuck my finger in her.” [A doctor] testified that his findings from his physical examination of the victim were consistent with her complaint of being touched in her vaginal area.

Id. at *7 (brackets omitted).

In his amended petition, Petitioner asserted numerous grounds for post-conviction relief. However, on appeal, Petitioner argues only that his conviction was improper because he was not given access to the victim’s prior statements to the Children’s Advocacy Center and that he received ineffective assistance of counsel.

The parties called seven witnesses at the post-conviction hearing. With respect to the issues Petitioner now raises before this Court, their testimony was as follows. Lyman Benefield, Petitioner’s father-in-law, testified that although he stands by his trial testimony regarding what Petitioner said to him, he now believes he may have misinterpreted Petitioner’s comments. He said that when Petitioner began to “confess” to him outside the police station after his interview with Detective Felton, Benefield became enraged and cut off the conversation. Benefield said that, in retrospect, he may have cut Petitioner off too soon and that he may have misconstrued Petitioner’s description of the placement of his hand on the victim. Notably, Benefield testified that he was not confused about whether Petitioner was confessing about an extra-marital affair with the victim’s mother rather than an improper act with the victim. Instead, Benefield made clear that his confusion was about what he believed Petitioner to be telling him he had done with the victim. In addition, Benefield testified that Petitioner had been diagnosed with Attention Deficit Disorder (ADD). He

stated that “[i]f you jump around in conversations with [Petitioner], you’re apt to lose him, because you’re talking about one thing and he’s on something else.”

Petitioner also called Larry Bryant to testify. Bryant had known Petitioner for approximately three to four years prior to trial. The two men were friends from church and had gone out to eat together on one occasion. Bryant acknowledged that they had not spent much “quality time” together. Bryant testified that he was not called to testify at trial, but that he thought Petitioner was a truthful person. He admitted, however, that he did not have an opinion about Petitioner’s truthfulness at the time of trial.

Petitioner’s wife of five years, Mildred Leann Simpson, also testified at the post-conviction hearing. She described how Petitioner is affected by his ADD. She explained that conversations with Petitioner can be difficult because Petitioner can get “sidetracked.” She explained that “it[’s] kind of like a rabbit trail, and he’ll follow that sometimes and go off onto a different conversation or a different subject while I’m still talking about the original one.”

Mrs. Simpson also detailed her numerous conversations with Petitioner’s trial counsel in preparation for trial. She testified that she gave trial counsel the names of various witnesses who could testify regarding Petitioner’s good character. She also discussed the option of calling the family psychologist, Dr. June Young, as well as Mrs. Simpson’s two daughters.

Finally, Mrs. Simpson testified that Petitioner’s trial counsel told her that he was not “prepared for how things went” and that “he wasn’t as prepared as he could have been.” She explained that she understood his comments to mean that he expected certain things to happen at trial that did not and that he was not as prepared for that contingency as he should have been.

Petitioner testified that he has been diagnosed with “ADDHD” and that he gets confused and has a hard time paying attention. Regarding his interview with Detective Felton, Petitioner said although Detective Felton read the Miranda rights form to him, the detective never explained those rights. Instead, Detective Felton simply gave the form to Petitioner to sign, which he did. Petitioner explained that the waiver “didn’t click” with him until later. Petitioner testified that had he known the significance of the waiver, he would have requested advice from an attorney.

Petitioner testified that Detective Felton tried to confuse him during the interview. He said that he did not recall the interview “very vividly,” but he remembered that they talked about the victim only briefly. Furthermore, he testified that when he confessed to Detective Felton about the sexual encounter, he believed they were discussing an affair

Petitioner had with the victim's mother. Similarly, he testified that his confessions to his father-in-law and others were admissions of the affair, not of inappropriate conduct with the victim.

Petitioner also testified regarding his discussions with trial counsel prior to his trial. Petitioner did not recall having conversations with trial counsel about which witnesses to call. He did recall suggesting several witnesses to his counsel.

Petitioner told the court that he, his wife, and in-laws were seeing Dr. Young around the time of the events leading to his prosecution. He testified that they saw Dr. Young, who is a local family counselor, approximately once a month for about a year. He said that they began to see Dr. Young because of some allegations of prior sexual abuse against him.

Detective Felton testified regarding his interview of Petitioner. At the time of the interview, Detective Felton had been with the Cleveland Police Department for approximately twenty years. When the interview began, he read Petitioner his Miranda rights and followed his usual procedure. He noted that Petitioner did not give any indication that he did not understand the waiver. He also testified that he was unaware of Petitioner's ADD until the post-conviction hearing. Detective Felton stated that, although he changed topics during the interview, the topics were clearly demarcated. He had "no question" that Petitioner was aware of what they were discussing during the interview. Indeed, Detective Felton testified that Petitioner was surprised that he was not arrested at the conclusion of the interview.

Petitioner's trial counsel testified that he had been a trial attorney since 1986. He was a public defender at the time of Petitioner's trial, but he had since joined the District Attorney General's office in Bradley County. Trial counsel described his preparations for trial, including his selection of witnesses. Counsel was aware that other individuals were in the house at the time of the alleged incident. However, when he visited Petitioner's home, he realized that the witnesses were unlikely to have any valuable evidence because of their limited ability to see into the room in which the encounter occurred. Moreover, when he contacted the witnesses they informed him that they did not have any useful information. After reviewing their statements and viewing their line of sight, he determined that they would not be good witnesses. Trial counsel testified that he considered calling character witnesses on Petitioner's behalf, but he chose not to out of fear that character testimony might open the door to cross-examination about prior acts. He was especially concerned about allegations of prior sexual abuse of children levied against Petitioner. Trial counsel explained that, for the same reason, he was reluctant to call Dr. Young, with whom he briefly spoke during his preparations. According to trial counsel, he believed that Petitioner would have to testify in order to deny the prior allegations and explain his supposed confessions. He concluded that presenting testimony regarding Petitioner's character might allow the

State to bring in evidence of prior allegations against Petitioner and would thus damage Petitioner's chances of success without significantly aiding his defense. He made a strategic decision to avoid that problem by not calling the witnesses.

Trial counsel testified that he did not believe a motion to suppress Petitioner's confession to Detective Felton would have been appropriate. He was aware of Petitioner's ADD, but he explained that, based on his interaction with Petitioner, he thought Petitioner understood what was happening when he gave his confession. Thus, he thought a motion to suppress would have been "frivolous."

Trial counsel was adamant that he vigorously pursued the issue of the videotape of the victim's pre-trial interview with the Children's Advocacy Center. Counsel said that while he had a summary of the interview, the video could have revealed information not included in the summary. He stated that summaries of such interviews are often biased toward the victim's story or do not convey leading questions or mannerisms that might suggest the child is being led by the interviewer. After filing a general motion for inspection of all the prosecution's evidence, trial counsel filed a specific motion to compel discovery of the videotape. He also filed two post-trial motions regarding the tape and then raised the issue on direct appeal. He testified that he felt so strongly about the issue that he requested oral argument on appeal. Trial counsel acknowledged that after the victim testified, he did not request production of the videotape pursuant to Tennessee Rule of Criminal Procedure 26.2. He explained that he made a strategic decision to not seek the videotape because he believed the issue was already sufficiently preserved for appeal. Also, he did not intend to "go after" the victim "with venom" on cross-examination because he did not want to inflame the jury. Trial counsel testified that he did not believe the victim's testimony was the critical evidence against Petitioner, therefore, an aggressive cross-examination of the victim might work to Petitioner's detriment.

Finally, trial counsel admitted that he did not press the court regarding a potential motion for a mistrial based on comments about Petitioner being in pre-trial detention that were made in front of the jury. Trial counsel testified that he raised the issue with the trial judge at one point, and the motion was denied. The judge did not declare a mistrial, but left it open for later discussion. Trial counsel recalled the trial court's "cool response" to the motion. Trial counsel acknowledged that if the record reflected that he did not raise the issue thereafter, he must have just forgotten to raise it.

Dr. June Young, a psychologist specializing in sexual and physical domestic abuse, also testified at the post-conviction hearing. Initially, Dr. Young saw only Petitioner's two step-daughters, who at the time were in the temporary custody of their grandparents. Petitioner was not yet their step-father. She explained that she began seeing Petitioner's family in 2003, at the request of Petitioner's future in-laws. The in-laws had been informed

of a prior allegation of sexual abuse against Petitioner. Specifically, a pastor in Petitioner's former hometown in Texas called a pastor at the in-laws' church in Cleveland to convey concerns he had about Petitioner marrying into a family with young children. The in-laws became concerned for their granddaughters' safety and requested an investigation, which led the family to Dr. Young. Dr. Young testified that she did not find any support for the allegation, which she characterized as a "rumor." However, she continued to see the family, and Petitioner joined in the sessions after the marriage. Dr. Young was not called to testify at trial.

On September 10, 2008, the trial court issued a written order denying the petition for post-conviction relief. The court first held that Petitioner was not entitled to the videotape of the victim's interview with the Children's Advocacy Center. It noted that the issue had already been presented and decided on direct appeal and was therefore not a proper basis for post-conviction relief. The court then turned to Petitioner's claims of ineffective assistance and again found no grounds for relief. Specifically, the court held that because there was no evidence concerning the impact of the statement regarding Petitioner's pre-trial confinement, Petitioner could not demonstrate that trial counsel's failure to seek a mistrial was prejudicial. Moreover, the court found that trial counsel's decision not to seek a mistrial was a strategic one based on counsel's belief that the motion would lack merit. Similarly, the trial court found there was no prejudice in trial counsel's failure to seek an instruction regarding the lesser-included offense of simple assault. It noted that this court considered and rejected the need for such an instruction on direct appeal. The court also rejected the argument that counsel was ineffective for failing to call several witnesses regarding the victim's credibility. Finally, the trial court dismissed the remaining grounds for relief, holding that "[t]here was no evidence to show that counsel was in any way ineffective in his defense of [P]etitioner."

On appeal, Petitioner raises several issues. First, he argues that this court and the post-conviction court erred in denying him access to the videotaped recording of the victim's interview with the Children's Advocacy Center. Additionally, he asserts that he received ineffective assistance of counsel based on counsel's failure to (1) investigate and raise the issue of whether the Petitioner's confession to Detective Felton was coerced; (2) review the victim's statements to the Children's Advocacy Center pursuant to Tennessee Rule of Criminal Procedure 26.2 after the victim testified at trial; (3) argue for a mistrial after reference was made in front of the jury to the Petitioner's pre-trial detention; (4) request an instruction on the lesser-included offense of simple assault; and (5) call various defense witnesses.

II. Analysis

To be successful in his claim for post-conviction relief, Petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing

evidence. See Tenn. Code Ann. § 40-30-110(f). ““Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.”” State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court’s findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A. Pre-Trial Access to the Victim’s Videotaped Interview

We begin with the first issue presented by Petitioner. We couch it in the terms presented in Petitioner’s brief: “Whether this Court erred when it failed [to] grant the petitioners [‘s] pretrial motion to provide the video recording of the child victim’s statement prior to the post conviction relief hearing?” Petitioner argues at length regarding this court’s denial of the pre-trial motion for access to the video and mentions also briefly the post conviction court’s denial of his motion.

Although Petitioner makes a thorough argument regarding the constitutionality of the denial of access to the videotape, that argument is not properly before this court in this proceeding. “A matter previously determined is not a proper subject for post-conviction relief.” Forrest v. State, 535 S.W.2d 166, 167 (Tenn. Crim. App. 1976). See also Miller v. State, 54 S.W.3d 743, 747-48 (Tenn. 2001). Furthermore, “[a] ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.” Tenn. Code Ann. § 40-30-106(h). This precise issue was raised and addressed during Petitioner’s direct appeal. See Simpson, No. E2005-02364-CCA-R3CD, 2007 WL 135609, at *3-4. Accordingly, because we have previously determined this issue, we will not now reconsider our decision. See Cole v. State, 798 S.W.2d 261, 264-65 (Tenn. Crim. App. 1990).

B. Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We review the post-conviction court’s findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we review the post-conviction court’s conclusions of law purely de novo. Id.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, “the petitioner bears the burden of proving both that counsel’s performance was deficient and that the deficiency prejudiced the defense.” Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). To establish deficient performance, the petitioner must show that counsel’s performance was below “the range of competence demanded of attorneys in criminal cases.” Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). When evaluating counsel’s performance, however, we generally will not second guess strategic and tactical decisions made by counsel, unless those decisions fall outside the range of competent representation. See Hellard v. State, 629 S.W.2d 4, 9-10 (Tenn. 1982). To establish prejudice, the petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Moreover,

[b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697, 104 S. Ct. at 2069).

We agree with the post-conviction court that Petitioner did not receive ineffective assistance of counsel. With respect to the first ground he asserts for counsel’s ineffectiveness, his alleged failure to properly investigate whether Petitioner’s confession was coerced, we conclude that Petitioner has failed to meet either prong of the test. Counsel testified that he considered filing a suppression motion but determined that such a motion would lack merit. Counsel noted that he was aware of Petitioner’s ADD, but based on his interaction with Petitioner he did not believe it interfered with Petitioner’s ability to comprehend the interview with Detective Felton. Petitioner’s trial counsel thus made a strategic decision not to pursue a suppression motion, which he believed to be “frivolous.” There is no basis in the record to show that counsel was ineffective by not filing the motion. See Hellard, 629 S.W.2d at 9-10. Moreover, there is no evidence in the record to indicate that, even if a motion to suppress had been filed, it would have created a “reasonable probability” that the result of the trial would have been different. First, based on the record before us, we conclude that it is unlikely the trial court would have granted the motion. Indeed, a key component of the argument is that Detective Felton “carefully crafted [his interview technique] to take advantage of” Petitioner’s ADD. While Detective Felton acknowledged that he did change subjects during the interview, he also noted that the

subjects were clearly demarcated during their discussions and, moreover, he was unaware of Petitioner's ADD until the day of the post-conviction hearing. Thus, it is unlikely that the court would have found that the confession was improperly obtained. Second, and more importantly, there were other witnesses who testified that Petitioner confessed to them, as well as other strong evidence against the Petitioner. See Simpson, No. E2005-02364-CCA-R3CD, 2007 WL 135609, at *7. Removing the confession to Detective Felton from the record, therefore, would not create a "reasonable probability" of a different result.

Regarding counsel's decision to refrain from seeking the videotapes, we conclude that Petitioner has failed to show that, even if he had been allowed to review the video, the result of the trial would have been different. We have viewed the videotape and conclude that counsel's decision did not prejudice Petitioner. As trial counsel noted, Petitioner confessed to numerous individuals. Moreover, the victim's statement and her testimony was consistent with Petitioner's early statements. Again, Petitioner has failed to show prejudice.

Petitioner's claim that trial counsel's failure to move for a mistrial after reference was made to Petitioner's pre-trial confinement in front of the jury also misses the mark. Initially, we note that the State is correct that Petitioner cites no support for the proposition that the "[f]ailure to argue the mistrial at a later time is ineffective per se." Tennessee Court of Criminal Appeals Rule 10(b) provides that an argument is subject to waiver if it is not properly supported by citation to the record or appropriate legal authority. Nevertheless, we are not persuaded on the merits. As noted above, it is Petitioner's burden to demonstrate both deficient performance and prejudice. See Goad, 938 S.W.2d at 369-70. As the post-conviction court noted, there is no evidence in the record that the statement had any impact on the jury. Therefore, we have no basis to conclude that the trial court erred in finding that no prejudice resulted from trial counsel's failure to move for a mistrial.

Petitioner gives similarly short shrift to his contention that counsel was ineffective in failing to call certain witnesses. The State is correct that such skeletal arguments are considered waived under our rules. See Tenn. Ct. Crim. App. R. 10(b). Regardless, we are not persuaded on the merits. With respect to the various character witnesses referenced in Petitioner's brief, the record indicates that trial counsel made a strategic decision to avoid calling witnesses that could open the door to cross-examination about past allegations of sexual abuse by Petitioner. We will not second-guess this sound trial strategy.

With respect to the various fact witnesses referenced in Petitioner's brief, the record similarly indicates that counsel made an investigation into their potential testimony and determined that they would not be helpful witnesses at trial. In particular, counsel noted that his interviews of the other people in the house on the night of the incident, combined with his investigation concerning their line of sight, led him to conclude that they offered no beneficial information. His strategic choice not to call those witnesses was, likewise, sound.

Finally, trial counsel's decision not to call Dr. Young was sound strategy for much the same reason as his decision not to call character witnesses. Dr. Young came to know Petitioner because of allegations of previous improper conduct. Those allegations led to a significant investigation at the request of Petitioner's future in-laws. Regardless, there is no evidence in the record to indicate that the testimony of any of these witnesses would have a reasonable probability of altering the outcome. Thus, Petitioner has again failed to meet either prong of the test for ineffective assistance.

Lastly, Petitioner lists counsel's failure to request a lesser-included offense instruction regarding simple assault as one of his issues on appeal. However, he makes no argument on that point in his brief, beyond a vague reference to it near the end. That reference is not sufficient. See Tenn. Ct. Crim. App. R. 10(b). The Petitioner conceded that the issue was previously decided by this Court on direct appeal. See Simpson, No. E2005-02364-CCA-R3CD, 2007 WL 135609, at *7. In short, this issue is not properly before us.

III. Conclusion

Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE